6-1-1976

Judy Jo Wood v. Commonwealth of Kentucky

Reply Brief 1975-SC-1104

REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1104

JUDY JO WOOD — APPELLANT

VS. — APPEAL FROM HOPKINS CIRCUIT COURT
HON. THOMAS B. SPAIN, JUDGE
INDICTMENT NO. 20031

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT

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BY: Timothy T. Riddell
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellant has been mailed, postage prepaid, to Hon. Thomas B. Spain, Judge, Hopkins Circuit Court, Hopkins County Courthouse, Madisonville, Kentucky 42431; Hon. Albert W. Spenard, Commonwealth Attorney, 4th Judicial District, Madisonville, Kentucky 42431; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 1st day of June, 1976.

Timothy T. Riddell

SUPREME COURT OF KENTUCKY

FILE NO. 75-1104

JUDY JO WOOD — APPELLANT

VS.

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COMMONWEALTH OF KENTUCKY — APPELLEE

* * * * * * * * * * *

MAY IT PLEASE THE COURT:

PURPOSE OF THE REPLY BRIEF

To respond to ARGUMENT I found in the Brief For Appellee. The failure of Appellee to refute Appellant's contentions found in ARGUMENTS II and III of his original pleading makes it unnecessary to respond to Appellee's ARGUMENTS II and III.

QUESTION TO WHICH THIS BRIEF ADDRESSED

WAS APPELLANT DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO SUPPRESS HER INVOLUNTARY EXTRA-JUDICIAL STATEMENTS?

ARGUMENT

APPELLANT WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO SUPPRESS HER INVOLUNTARY EXTRA-JUDICIAL STATEMENTS.

Appellee contends that Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532 (1877) can be factually distinguished from the case under consideration (Brief For Appellee, p.8). It is interesting to note that Appellee does not contend that the constitutional rules of law found in those cases are not applicable to the case at bar which is strange since Bram was cited solely for the constitutional proposition that "any doubt as to whether [a] confession was voluntary must be determined in favor of the accused." Id., at 565. Malloy, supra was cited to establish the test which the Supreme Court of the United States has promulgated to determine whether or not the doubt referred to in Bram, supra was extant during an extra-judicial statement. This constitutional test is as follows:

> . . .the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * *" Malloy v. Hogan, supra at 7.

As established in Appellant's original pleading, when these criteria are applied to the facts of the case at bar, obviously the confession should not have been admitted into evidence for not only was Appellant under extended verbal abuse and threats from Daugherty and Gillingham (T.R., p. 150), but also Appellant was promised that she would be protected (T.R., p. 152) and that if she told all she knew that she would not be tried for the murder of her father (T.R., p. 153). Finally Appellant was told

that the Commonwealth would see to it that she would get to go to North Carolina if she would cooperate (T.R., p. 161). It is interesting to note that not only does Appellee fail to refute these facts but it also fails to even address Appellant's contention that the statements procured after these coercive maneuvers were involuntarily and thus unconstitutionally obtained. It is therefore abundantly clear that the ruling of the court below in allowing into evidence these involuntary statements was clearly erroneous and accordingly Appellant was denied a fair trial.

Appellee next attempts to summarily dismiss Kentucky decisions regarding involuntary confessions by suggesting that they can be distinguished (Brief For Appellee, p. 8). Again Appellee fails to even attempt to demonstrate the veracity of this contention. This is understandable for those Kentucky cases are a firm basis for reversing the conviction in this case.

This Court in Cobbs v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418 (1936) reversed Cobb's conviction because Cobb's extra-judicial statement was procured after prolonged questioning and inducements. Appellant was faced with the same circumstances.

This Court in Collins v. Commonwealth, Ky., 25 S.W. 743 (1894) likewise reversed a conviction where the record showed that Collins "was impressed [by one of his interrogators]. . .with the belief that he would be 'let out' on condition that he tell the whole story." Id., at 744. In order to get Appellant to "tell the whole story" Gillingham promised her, "No, you aren't going to be tried. I will guarantee you that" (T.R., p. 153). Obviously, Appellant suffered the same misrepresentations as Collins and therefore is entitled to a reversal of her conviction.

This Court, as early as 1907, in the case of Owsley v. Commonwealth, Ky., 101 S.W. 366 (1907) developed a voluntariness standard similar to the one promulgated by the United States Supreme Court in Malloy v. Hogan, supra:

> If this confession had been procured by promise of reward or hope of immunity from punishment or extracted by violence or threats, it would be clearly incompetent as evidence against the accused. Owsley, supra at 367.

It is clear despite Appellee's contention to the contrary that Owsley is applicable to the case at bar and that under the test found therein Appellant's extra-judicial statement was "clearly incompetent." Id.

The pertinent United States Supreme Court and Kentucky decisions can not be so hastily dismissed as Appellee pretends. Bram, supra, Malloy, supra, Cobb, supra, Collins, supra, and Owsley, supra, are definitively applicable and mandate a reversal of Appellant's conviction.

Appellee suggests that the admission of Appellant's statements was harmless error allegedly because Appellant's statements were so non-incriminating that their admission did not result in an unfair trial (Brief For Appellee, p. 5). Appellee totally undermines this contention when in its Argument III it asserts that Appellant was not entitled to a directed verdict partially because of the alleged incriminating nature of the extra-judicial statements in question (Brief For Appellee, pp. 13-14).

Appellant has based her argument on firm United States Supreme Court standards and similar decisions of this Court which go directly to the issue sub judice. The manner of interrogation is clearly discerned from the tapes. Appellant's subjection to promises and intimidation resulted in involuntary statements that should have been inadmissible at trial. Since these statements

were admitted into evidence and were used against Appellant to obtain the conviction, Appellant's rights to due process and to a fair trial were fatally tainted. Accordingly Appellant is entitled to relief.

CONCLUSION

For the reasons delineated above, together with the reasons found in her original pleading, Appellant respectfully requests this Court to reverse her conviction from the court below and grant her any and all relief to which she is entitled.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY

File No. 75-1104

JUDY JO WOOD — APPELLANT

V.

APPEAL FROM HOPKINS CIRCUIT COURT
HON. THOMAS B. SPAIN, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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Assistant Attorney General

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JUDY JO WOOD — APPELLANT

V.

APPEAL FROM HOPKINS CIRCUIT COURT
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COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

STATEMENT OF QUESTIONS PRESENTED BY APPELLANT

I. WAS APPELLANT DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO SUPPRESS APPELLANT'S INVOLUNTARY EXTRA-JUDICIAL STATEMENTS?

II. DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT DENIED APPELLANT'S MOTION TO VOIR DIRE THE JURY INDIVIDUALLY AND OUTSIDE THE HEARING OF OTHER JURORS?

III. DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT DENIED APPELLANT'S MOTION FOR A DIRECTED VERDICT?

COUNTERSTATEMENT OF THE CASE

On the night of December 31, 1974, Jack Wood, a resident of Hopkinsville, Kentucky, was shot from ambush as he was getting into his car near the rear of his house (Transcript of Evidence, hereinafter T.E., p. 22).

On February 20, 1975, the Christian Circuit Grand Jury returned Indictment 20031 which charged that Thomas Edward Redd, Jr., Charles Wayne Bussell and Judy Jo Wood (Jack Wood's nineteen-year-old daughter) "murdered Jack Wood by shooting him, after conspiring together so to do" (Transcript of Record, hereinafter T.R., p. 9).

The indictment read:

> "The Grand Jury charges on or about December 31st, 1974, in Christian County, Kentucky, the above-named Defendants murdered Jack Wood by shooting him after conspiring so to do against the peace and dignity of the Commonwealth of Kentucky."

On February 27, 1975, appellant and her codefendants filed a Petition for Change of Venue and supported same with the required affidavits (TR 10-16). Some eight days later, the judge of the Christian Circuit Court, after conducting a hearing, granted the Petition for Change of Venue and transferred appellant's case to the Hopkins Circuit Court (TR, p. 17).

On March 28, 1975, appellant filed a Motion to Suppress those statements procured from her on January 10, 1975, during a seven-hour interrogation (TR 139). The trial court conducted an evidentiary hearing on this motion on April 2, 1975 (TR 269-376).

Some fifteen days later the court below overruled appellant's Motion to Suppress, finding that appellant's "statements were free and voluntary and that she was properly advised of her rights" (TR 387-388).

On April 30, 1975, the Commonwealth moved the trial court "to order separate trials for . . . Thomas Edward Redd, Jr., Charles Wayne Bussell, and Judy Jo Wood" (TR 402). On the same day the trial court granted the Commonwealth's motion and set appellant's trial date for May 13, 1975 (TR 403). The trials of appellant's codefendants were continued to an unspecified date (TR 403).

Appellant's trial began on the morning of May 13, 1975 (TR 431). At 11:15 a.m., on May 16, 1975, the jury returned a verdict of guilty (TR 454).

On May 23, 1975, appellant through her trial counsel filed a Motion for a New Trial (TR 464-466). This motion was not overruled until August 11, 1975 (Supplemental Transcript of Record, hereinafter S.T.R., p. 1).

In the interim the trial court had entered the Judgment in appellant's case (TR 468). Once the trial court overruled appellant's Motion for a New Trial, appellant filed notice of her intentions to appeal from the Judgment which had imposed a sentence of life (S.T.R. 2). Thereafter, appellant prosecuted this appeal.

ARGUMENT

I. WAS THE APPELLANT DENIED A FAIR TRIAL WHEN THE TRIAL COURT FAILED TO SUPPRESS HER INVOLUNTARY EXTRA-JUDICIAL STATEMENTS AS STATED IN APPELLANT'S BRIEF.

The appellant, in support of her motion to separately voir dire jurors, cited the case of Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), a habeas corpus action. In Irvin v. Dowd it was held that the prisoner was denied due process of law under the Fourteenth Amendment because the jury in the state was not impartial.

In the instant case Volume I, pages 1 to 103 inclusive, the transcript of record contains the voir dire examination in this case. It is to be noted that each prospective juror in variant verbiage is questioned about his or her ability to give the appellant a fair and impartial trial. The jury was accepted by both of the parties hereto (TR 100-104).

The death of Jack Wood occurred on December 31, 1975. That very night,within two hours, as a matter of fact, the appellant went to the Hopkinsville Police Station. There a policeman asked her, "Who is your boyfriend?" and she replied, "Why he didn't do nothing" (TE 324). The next day, January 1, she called State Police Detective Sergeant Ed Daughtery and wanted him to cooperate, but at that time "Daughtery wouldn't talk to her" (TE 325, L. 8, 9). Detective Daughtery would not go and meet her. He did, however, "talk to her on the phone," at which time she gave him apparently fake information concerning her father and the ex-wife of a respected Hopkinsville business man named Jim Moss (TE 325, 326).

The initial contact with the State Police was made by the appellant. The State Police having been given false

information naturally questioned appellant's action and became suspicious of the appellant concerning her father's death.

Eight days went by before she talked with and was interrogated by Detective Daughtery and Clarence Gillingham. Apparently the appellant became apprehensive or frightened when she learned of the presence of Clarence Gillingham, the polygraph machine operator and crime technician (TE 145, 149, 161, 168). However, she did thereafter voluntarily give her version of the death of her father, Jack Wood, as it was related to her by codefendant Bussell.

Counsel for appellant in his argument to the jury stated: "Miss Wood's statement is merely a statement that led the police to solve the crime of Jack Wood's murder. It is in no way a confession. Those statements contained in there, in any form or fashion, do not constitute a crime and especially this crime." (See Volume IV, TE 313.)

If appellant's counsel's argument is correct, then, in that event, if there were any errors by the court in overruling appellant's motion to suppress appellant's statements in Hopkinsville, Kentucky, they were harmless errors by the appellant's counsel's own admission.

Appellant Judy Jo Wood had asked Ed Daughtery to talk to her on the morning of January 10, 1975 (TR 7). On the morning of January 10, 1975, Detective Daughtery and Clarence Gillingham, the polygraph machine operator, were with appellant for some time. The two officers repeatedly requested her to

calm down and Daugherty assured her that if she was innocent and afraid of anyone involved they would "protect her in any way they could" (TR 150-153). The appellant stated she didn't know anything about her father's death and Mr. Gillingham assured her that he "didn't think she did either." There was some delay and difficulty before Detective Daughtery and Gillingham got the appellant settled down (TR 145-153). Thereafter, the appellant did give her version of Jack Wood's death as it was allegedly described to her by codefendant Bussell.

The appellant was not under arrest at the time of the questioning. Her actions had been voluntary from the beginning of her first contacting the police. Hence, it appears that the case of Miranda v. Arizona, 384 U.S. 436 (1966) which includes cases reported through volumes 303 of the Federal Supplement and 421 of the Federal Reporter, would not apply.

The appellant was not under arrest at the time the statement was given nor was she informed that it was highly probable that she would be under arrest at any subsequent time. Counsel for appellant did make a motion to suppress the appellant's statement alleging that was in violation of the Fifth and Fourteen Amendments of the United States Constitution and also Section 11 of the Kentucky Constitution (TR 139).

It appears that the case of Brown v. Mississippi, 297 U.S. 278 (1936) is not controllingly applicable. The Court of Appeals (now Supreme Court of Kentucky) has been very cognizant of Brown v. Mississippi, supra, since it first followed the ruling therein

in Edwards v. Commonwealth, 182 S.W.2d 948 (1944), in which the preparer of this brief was counsel for the defendant.

The Hopkinsville Police Department by various law officers did talk with the appellant. The actions of the officers in procuring certain statements from appellant were recorded on tape and had been transcribed and introduced below (TR 144-201; 230-245). However, there is some conflict in the testimony as to the events surrounding the interrogations.

The police having had misrepresentation made to them involving Jim Moss and his ex-wife, the Hopkinsville Police Department on January 10, 1975, decided that appellant's future statements should be subjected to a polygraph examination and recording as a matter of caution.

In the instant case appellant had not been arrested, deprived of her freedom, taken into custody or otherwise deprived of her freedom in any significant way. It is admitted, however, that the event occurred in a building used for law enforcement purposes which could be considered a compulsive factor outside of the actual questioning itself.

This Commonwealth has a statute that was specifically implemented to insure that involuntary confessions are not to be introduced during the trial of the defendant who gave the statements. KRS 422.110 provides:

> "(1) No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.

"(2) A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court."

It is to be noted, however, that this statute applies only to persons "charged with crime." The appellant was not"charged with crime" before or at the time of the questioning.

The cases of Bram v. United States, 168 U.S. 532, 565 (1877); Malloy v. Hogan, 378, U.S. 1, 7 (1964), are distinguished from the appellant's case both as to facts, the initial contact and the degree of extra-judicial interrogation. The same applies to Rector v. Commonwealth, 80 Ky. 468, 470 (1882); Cobb v. Commonwealth, 267 Ky. 176, 101 S.W.2d 418 (1936); Collins v. Commonwealth, Ky., 25 S.W. 743 (1894); Owsley v. Commonwealth, Ky., 101 S.W. 366 (1907).

Nor was the appellant's statement procured contrary to due process of law as set out in Payne v. Arkansas or Jackson v. Demo, 378 U.S. 308, 376 (1964).

II. DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT DENIED APPELLANT'S MOTION TO VOIR DIRE THE JURY INDIVIDUALLY AND OUTSIDE THE HEARING OF OTHER JURORS?

The trial court did not err to the appellant's substantial prejudice when it denied appellant's motion to voir dire the jury individually and outside the hearing of other jurors. The court in its discretion preferred to keep the trial open to the press and to the public. The trial court's refusal to permit defense counsel to question jurors on voir dire individually and out of the hearing of other prospective jurors

concerning newspaper articles and potential racial prejudice, voir dire outside of the court room and other jurors was within the trial court's discretion. In circumstances of potential prejudice separate individual examination of the prospective jurors is a matter of procedural policy, not a requirement of due process. See Ferguson v. Commonwealth, 512 S.W.2d 501 (1974); Ky. C.L. Key 267; 31 (13) C.R. 9.66.

As the Kentucky Court of Appeals pointed out in Rigsby v. Commonwealth, 495 S.W.2d 799 [8-10] (1973): "A defendant who fails to exhaust such challenges cannot complain concerning the jury selection. Certainly, if the biased juror is not impaneled, no prejudice can result."

The record doesn't show that the appellant used all of her peremptories to dispose of suspected unbiased jurors. The appellant had been given a change of venue and the appellee admits she was entitled to a fair trial by a panel of impartial, indifferent jurors at the voir dire examination.

Appellant complained that because some of the prospective jurors might be racially prejudiced simply because one of the codefendants was white and the other black. In these days when the courtship and the marriage of black and white people is rather common in every state in the Union, it is common practice in open court to ask the prospective jurors about his attitude and feeling concerning racially mixed courtships and marriages. Black and white people alike are more open, frank and truthful with each other, especially in open court where racism is even more out of place. While much remains to be done on the racism

question, prejudice is becoming more infrequent and obscure with passage of time. Confrontation in voir dire procedure is a healthy thing rather than a detrimental one. Hence, there was no abuse of his discretion by the trial judge.

The contention that some of the jury panel are black and some are white and that there would be a potential reluctance on the part of prospective jurors to admit prejudice in the presence of his fellow black or white jurors is purely a speculative, highly presumptive conclusion and without foundation in a case in which a change of venue had been granted. In the instant case appellant's counsel had the duty to examine all prospective jurors about the matter of the courtship of the two persons if any doubt existed. The juror could then have been stricken as having and possessing previously formed opinions.

It is common and elementary practice in Kentucky for the defendant's counsel on voir dire to interrogate prospective jurors as to the likelihood of any seriously prejudicial material having reached the prospective juror. The due process doctrine is applicable and available for relief only to prejudicial material which actually reached the jury and thus infected the prospective juror. See the criminal action styled U.S. Ex Rel Doggett v. Yeager, 472 F.2d 229 (1) (1973). The instant case had been removed from the county where the homicide occurred pursuant to Kentucky law and away from the prejudicial newspaper publicity at the local level. Hence, the facts in the Yeager case in which an attempted escape was involved differ greatly

from those of the appellant's case and they are not controllingly applicable of jury selection by voir dire herein. The trial judge ruled that the questions as to racial prejudice should be asked of the entire panel (TE 39-42). After thirty-nine years of practicing law and observing jury selections and voir dire examinations in Kentucky courtrooms, the preparer of this brief is of the opinion that black people and white people are more frank, fair and show a greater respect for each other than anywhere else unless in the churches. As a rule, the two races actually have a great respect for the law.

Standard 3.4 announced in the American Bar Association in the article entitled, Standard Relating to Fair Trial and Free Press (1968) was only intended to be suggestive, directory and not mandatory. The American Bar Association was not making any attempt to straight-jacket, impair or reduce the trial judge's discretion in presiding over voir dire. The trial judge of the Hopkins Circuit Court to which the case has been moved for trial knew and was better acquainted with and undoubtedly more able to judge the temperament of people and more able to know whether or not a long extensive hassle with each individual prospective juror outside of the other prospective jurors would help eliminate or aggravate racial prejudice at the trial.

The court asked the accepted members of the panel if they possessed any racial prejudice to hold up their hand (TE 39-42). Had any juror held up his hand the court would have allowed full and complete examination of counsel on and into the juror's prejudice. The court was cautious to inform and admonish the

jury about outside influences. The court said, "This is why it is necessary to insulate the jury, if you please, from any outside influences or sources of information other than what is received during the trial of this case" (TR 11; also see TR 4 to 7, inclusive).

The case of Ham v. South Carolina, 409 U.S. 524, 35 L. Ed. 46, 93 S.Ct. 848 at pages 48-50, cited by appellant, held that "the trial judge is not required to put the question in any particular form, nor to ask any particular number of questions on the subject, simply because he is requested to do so by the defendant." In the same case, § 842, the Court held:

> "3. During a voir dire, a trial court has a broad discretion as to the questions to be asked, and the discretion as to form and number of questions permitted by the due process clause of the Fourteenth Amendment is at least as broad."

In the case of Alfred Scott Aldridge v. United States of America, 283 U.S. 308, 318 (1931), the Court held that "A negro on trial for killing a white man is entitled, even in a jurisdiction in which negroes have the same privileges and rights under the law as the white race, to have jurors asked on voir dire examination whether they have any racial prejudice which might prevent the giving of a fair and impartial verdict." See also 1 A.L.R. 1688, § 42. The Court also held: "Jury, § 42. The discretion of the court as to the questions to be asked jurors on voir dire examination is subject to the essential demands of fairness."

III. THE TRIAL COURT DID NOT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE WHEN IT OVERRULED HER MOTION FOR A DIRECTED VERDICT.

Let's look briefly to see if there was a sufficiency of evidence to take or let this case go to the jury.

> "On consideration of motion for directed acquittal or acquittal non obstante, evidence is to be viewed in light most favorable to government." (U.S. v. Cortez, 425 F.2d 453, certiorari denied 91 S.Ct. 147, 400 U.S. 906, 27 L.Ed.2d 143.)
>
> "On ruling on a motion for a directed acquittal, the trial judge does not act as trier of the facts, substituting his judgment for that of the jury, but merely exercises his governance over the trial to insure that no miscarriage of justice occurs; it is his duty to prevent the jury from speculating on insubstantial evidence when a man's freedom is at stake." (U.S. v. Bradford, 423 F.2d 681.)

Estepp v. Commonwealth, Ky., 481 S.W.2d 93 (1972); Webb v. Commonwealth, Ky., 489 S.W.2d 831 (1973).

> "It is only where evidence for a defendant conclusively establishes justification that he is entitled to a directed verdict." (Townsend v. Commonwealth, 474 S.W.2d 352 (1972).
>
> "It is only where testimony on behalf of Commonwealth fails to incriminate defendant or is wholly insufficient to show guilt that directed verdict of acquittal should be given." (Bradley v. Commonwealth, 465 S.W.2d 266 (1971).

Green v. Commonwealth, Ky., 488 S.W.2d 343 [10] (1972).

Mrs. Leta Dunn and Miss Wood told the police where the gun used in the fatal shooting of Jack Wood was disposed of (TE 3, 223, 224). The gun was recovered. Co-defendant Thomas Redd's fingerprints and palm prints were found on the gun. Mrs. Dunn testified that appellant Miss Wood, Charles Wayne Bussell and Thomas Edward Redd, Jr., were together in the

afternoon on the day of the murder (TE 311). Appellant gave her statement which her counsel stated she "didn't back off from one bit" (TE 317). The trial jury apparently believed all of the appellant's statement of January 10th upon which appellant's counsel asserts the Commonwealth built its case (TE 319). The jury also believed that the conspiracy actually existed between the parties. The jury further believed the evidence beyond a reasonable doubt as required by the court's instructions. (Vol. I, TE 305-307 inclusive; 311, lines 4-6.)

The sufficiency of the appellant's alibi explanations was for the jury to determine. See Jones v. Commonwealth, 453 S.W.2d 564-566 (1970); Wheeler v. Commonwealth, Ky., 472 S.W. 2d 254 (1971); Webb v. Commonwealth, supra.

In this case it is apparent the jury did not believe appellant's testimony as to her behavior. It is the jury that must weigh the credibility of the testimony it hears. See Lewis v. Commonwealth, Ky., 471 S.W.2d 301 (1971); Fible v. Commonwealth, Ky., 461 S.W.2d 553 (1971); Leigh v. Commonwealth, Ky., 481 S.W. 2d 75, 79 [9] (1972).

Appellant was not entitled to a directed verdict by the trial judge. See Carmen v. Commonwealth, Ky., 490 S.W.2d 744 (1973); Matthews v. Commonwealth, Ky., 481 S.W.2d 647 (1972) on totality of the evidence.

CONCLUSION

The judgment of the Hopkins Circuit Court in which the life sentence was imposed should be affirmed.

Respectfully submitted,

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